

No. 10705

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

DIESEL SCREW "BETSY ROSS," PETER CEKALOVICH,
DOMINIC MRATINICH and FRANK MULJAT,

Appellants,

vs.

STEVE KULJANOVICH,

Appellee.

Opening Brief for Appellants Diesel Screw "Betsy
Ross," Peter Cekalovich, Dominic Mratinich and
Frank Muljat.

FILED

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Opening Brief for Appellants Diesel Screw "Betsy
Ross," Peter Cekalovich, Dominic Mratinich and
Frank Muljat.

Jurisdictional Statement.

This is an appeal in admiralty from a final decree entered by the United States District Court for the Southern District of California, Central Division, in an action for wages, maintenance and cure, and for damages pursuant to the provisions of the Jones Act (46 U. S. C. A. 688), all arising out of an injury sustained by the appellee on May 3rd, 1942, while he was standing in the warehouse of the Crescent Warehouse Company, located on Terminal Island in the County of Los Angeles. Appellee had been employed on the day prior to the accident as a seaman-fisherman on the fish boat "Betsy Ross."

The pleadings in the District Court were: A libel *in rem* and *in personam* filed by the libellant Steve Ruljanovich, a second amended libel *in rem* and *in personam* [Ap. 3], claim of Peter Cekalovich, Dominic Mratinich and Frank Muljat [Ap. 10], exceptions to second amended libel [Ap. 14], third amended libel *in rem* and *in personam* [Ap. 19], answer to third amended libel *in rem* and *in personam* [Ap. 26].

After trial, before the court, judgment was ordered in favor of libellant for the sum of \$5,050.46 as wages for the tuna and sardine seasons, for the sum of \$825.00 for maintenance and for the sum of \$94.90 medical expense. Judgment in favor of the respondents in said action was entered with reference to the cause of action predicated upon the Jones Act [Ap. 36].

Findings of fact and conclusions of law were filed on December 23rd, 1943 [Ap. 37]; final decree was entered on December 23rd, 1943 [Ap. 39].

Appellants have appealed from the final decree pursuant to which it is ordered, adjudged and decreed that the libellant recover the sum of \$5,050.46 as wages for the tuna and sardine seasons ending on the 15th day of February, 1943, with interest thereon from February 15th, 1943, at the rate of 7% per annum; and the further sum of \$825.00 as maintenance from May 11th, 1942, to April 5th, 1943, with interest thereon from April 6th, 1943, at the rate of 7% per annum; and the further and additional sum of \$94.90 for medical expenses; and costs of libellant taxed in the sum of \$166.08.

The transcript of the Apostles on Appeal, certified by the Clerk of said District Court, includes the following: Petition for appeal [Ap. 40], order allowing appeal [Ap. 41], notice of appeal [Ap. 42], bond on appeal [Ap. 43],

notice of filing bond on appeal [Ap. 42], citation on appeal [Ap. 2].

The jurisdiction of the District Court over actions, civil and maritime, involving claims for wages and maintenance arises from Article III, Sections 1 and 2 of the United States Constitution, which provide that the judicial power of the United States shall be vested in the Supreme Court and in such inferior courts as Congress may establish, and that such power shall extend to all civil causes of admiralty and maritime jurisdiction.

Jurisdiction of civil causes of admiralty and maritime jurisdiction was vested in the courts of the United States by the Act of Congress of September 24, 1789, c. 20, Secs. 9, 11; 1 Stat. L. 76, 78; 28 U. S. C. A., Sec. 371.

Appeals from final decrees in admiralty are authorized by Section 128a of the Judicial Code, as amended February 13th, 1925, effective May 13th, 1925 (43 Stat. L. 936, 28 U. S. C. A., Sec. 225), providing that the Circuit Court of Appeals shall have appellate jurisdiction to review, by appeal, final decisions.

Statement of the Case.

On May 3rd, 1942, libellant was employed by Peter Cekalovich as a seaman-fisherman on the fish boat "Betsy Ross." The District Court found that libellant was employed for both the tuna and sardine fishing seasons. The testimony respecting the employment is so brief that appellants set forth this portion of the testimony in full.

Steve Ruljanovich testified as follows:

"Q. What did he (Peter Cekalovich) say to you?

A. He said would I like to go fishing.

Q. What did you say? A. I said, 'Yes, I like to go fishing with you for tuna and sardines, because I

worked in the cannery for the French Sardine, because if you don't give me a chance to fish for sardines I lose my seniority list.'

Q. What did he say? A. He says yes." [Ap. 67-68.]

Peter Cekalovich testified on the subject of employment as follows:

"Q. What did you say to him (Steve Ruljanovich) and what did he say to you? A. I need the man to go fishing with me. I asked him if he wanted to go fishing with me.

Q. What did he say? A. Well, he said he was kind of thinking whether to go or not, because I asked him several times before to come fishing. He said, 'Well, I think I would come, if you keep me on for sardines,' because he figured the tuna season was not so very good, and that is why he wants to be on the sardines.

Q. What did you tell him? A. I told him I never quit anybody that is good on the boat. He could continue to fish with me, if he was willing to come.

Q. Did you tell him he could fish then for both the tuna and the sardines? A. Yes." [Ap. 156-157.]

On the following morning libellant reported to the vessel where it was anchored in a slip in San Pedro. Later on in the morning the vessel was moved to Fish Harbor and the libellant, in company with five or six other members of the crew, proceeded in a truck to the warehouse of the Crescent Warehouse Company where the fish net belonging to the "Betsy Ross" was stored [Ap. 69-70]. It was the purpose of libellant and the other crew members to pick up the net and put it on board the vessel. While libellant was standing inside the warehouse he was struck

on the head by a 4 by 4 timber approximately 16 to 18 feet in length which was located just inside the doorway of the Crescent Warehouse Company [Ap. 717-72]. Libellant sustained certain injuries which required hospitalization.

Although appellee was aboard the "Betsy Ross" from the time that it left its slip in San Pedro until the time that it arrived at Fish Harbor, there is not one scintilla of evidence indicating that appellee ever did any work of any kind or character aboard the vessel. The record is barren of any testimony which indicates that the appellee did anything at the Crescent Warehouse Company.

After the accident it was between twenty to thirty days before the vessel put out to sea [Ap. 255].

On or about January 19th, 1943, libellant filed in the Industrial Accident Commission of the State of California an application for the adjustment of compensation pursuant to the provisions of the Labor Code of the State of California, in connection with the injury and disability which he sustained on May 4th, 1942 [Ap. 63-65]. Thereafter a hearing was had before the Industrial Accident Commission of the State of California, at which time testimony was taken and an award for compensation made to libellant. A copy of the findings and award of the Industrial Accident Commission is set forth in the Apostles at pages 276-277. One of the findings of fact of the said Commission is as follows:

"Said employee at the time of the injury was not engaged in work in connection with his occupation as a seaman and said injury did not occur on a vessel or on navigable waters outside of the State of California but within the boundaries of the State of California and therefore this Commission has jurisdiction in this proceeding." [Ap. 276-277.]

Since the trial of the present action, the said award of the Industrial Accident Commission has been annuled by the Supreme Court of the State of California. At the time of the writing of this brief, however, the time within which a petition for a rehearing in the Supreme Court of the State of California could be filed has not as yet expired and likewise the time within which the Industrial Accident Commission might apply to the Supreme Court of the United States for a Writ of Certiorari has not expired. Under the circumstances, therefore, the action of the appellate courts of the State of California is not as yet final.

There is evidence that the 1/17th share of the catch for both the tuna and sardines seasons would amount to \$5,050.46 [Ap. 161-162]. Libellant introduced no evidence indicating how much of the said amount was referable to the tuna season or how much was referable to the sardine season.

Upon the foregoing evidence the District Court found that the libellant entered into his duties as a member of the crew of the "Betsy Ross" on May 4, 1942, and that while engaged in the service of the ship and while doing his duty and obeying the commands of the master of the "Betsy Ross," libellant was struck on the head with a heavy timber while at a warehouse located on Terminal Island, at the Port of Los Angeles, for the purpose of bringing the ship's net from the said warehouse to the "Betsy Ross" and that by reason of the foregoing the Court had jurisdiction and the libellant was entitled to the sum of \$5,050.46 as wages for the tuna and sardine seasons ending on the 15th day of February, 1943, the sum of \$825.00 as maintenance from May 11th, 1942, to April 5th, 1943, and the sum of \$94.90 for medical expense.

Assignment of Errors.

The assignment of errors upon which appellants rely are set forth in the Appendix to this brief and are summarized in the following statement of points involved in the appeal of said appellants:

1. This appeal in admiralty is a trial *de novo*.
2. The District Court erred in finding that the subject matter of the first and second causes of action, or either of them, set forth in the third amended libel, was within the admiralty jurisdiction of the United States District Court, for the reason that the exclusive remedy of the libellant was and is within the exclusive jurisdiction of the Industrial Accident Commission of the State of California.
3. Under the general maritime law is a fisherman-seaman, engaged for the tuna and sardine fishing seasons, entitled to recover wages for both of said seasons where his injury occurs prior to the commencement of either season or in any event prior to the commencement of the second season?

Outline of Argument.

- I. This admiralty appeal is a trial *de novo*.
- II. A fisherman employed twenty to thirty days prior to the departure of a vessel, who is injured while standing in a warehouse located on land, just prior to the time that a fishing net was to be removed therefrom, is not engaged in the performance of any duties which would entitle him to pursue any maritime remedies, and his sole and exclusive remedy, if any, for injuries sustained at such a time, would be by proceedings before the Industrial Accident Commission of the State of California, pursuant to the provisions of the Labor Code of the State of California.
- III. A fisherman injured prior to the commencement of the tuna season is not entitled to recover wages beyond the particular season in which he was injured.

I.

This Admiralty Appeal Is a Trial de Novo.

No citation of authority is necessary to establish the contention that an admiralty appeal to the Circuit Court of Appeals is a trial *de novo*.

II.

A Fisherman Employed Twenty to Thirty Days Prior to the Departure of a Vessel, Who Is Injured While Standing in a Warehouse Located on Land, Just Prior to the Time That a Fishing Net Was to Be Removed Therefrom, Is Not Engaged in the Performance of Any Duties Which Would Entitle Him to Pursue Any Maritime Remedies, and His Sole and Exclusive Remedy, if Any, for Injuries Sustained at Such a Time, Would Be by Proceedings Before the Industrial Accident Commission of the State of California, Pursuant to the Provisions of the Labor Code of the State of California.

The evidence indicates, without dispute, that on May 3rd, 1942, the libellant was employed as a fisherman aboard the "Betsy Ross." The vessel was not ready for immediate departure on the day of the libellant's injury because the net had to be procured and work had to be done thereon. It was approximately twenty to thirty days thereafter before the vessel put out to sea for the purpose of fishing for tuna [Ap. 255]. The record is barren of any evidence indicating that the libellant performed any duty, prior to the time of his injury, which was ordinarily performed by a fisherman-seaman. It is also barren of any testimony showing that libellant had done anything other than to accompany the vessel from San Pedro to Terminal Island,

at which point he got in a truck and rode to the warehouse along with several other members of the crew.

It is the contention of the appellants that the workmen's compensation laws of the State of California are applicable to the injuries sustained by the libellant, if he was injured while in the service of the vessel, for the reason that those laws may be invoked without in the slightest degree interfering with the harmony and uniformity of admiralty law. The point was preserved by appellants by appropriate exceptions filed to the second amended libel [Ap. 14-18] and by objection at the time of trial [Ap. 61-62].

The case at bar cannot be distinguished, factually or otherwise, from the case of *Alaska Packers' Association v. Industrial Accident Commission of the State of California*, 200 Cal. 579, 253 P. 926. In that case the Supreme Court of the State of California affirmed an award of workmen's compensation made by the respondent Commission, which judgment was later affirmed by the Supreme Court of the United States (276 U. S. 467, 72 L. Ed. 656). One Peterson entered the employ of the petitioner, Alaska Packers' Association, as a seaman-fisherman, shipping from San Francisco to Alaska. On arrival in Alaska he was taken with the rest of the crew to one of the employer's canneries and put to work repairing nets and overhauling the fishing boats preparatory to the commencement of the fishing season. During the season he worked as a seaman-fisherman on the boats. At the close of the season Peterson, while standing on shore attempting to launch a stranded boat for the purpose of storing it for the winter, was injured, for which injury he was awarded compensation by the California Industrial Accident Commission.

With respect to the nature of Peterson's employment, the Supreme Court of the State of California said (200 Cal. p. 581, 253 P. 927):

"Peterson's contract with the petitioner was undoubtedly maritime in its nature. (Cases cited.) We do not regard the fact that the employee worked at mending nets, performed services in loading and unloading lighters carrying the cargo to the ship, and, part of the time while the vessel was in Alaska, slept on shore, as qualifying in any way the nature of his contract, or rendering it severable. Generally speaking, parties entering into maritime contracts contemplate the system of maritime law, and its well-known rules control their rights and liabilities, to the exclusion of state statutes. (Union Fish Co. v. Erickson, 248 U. S. 308 (63 L. Ed. 261, 39 Sup. Ct. Rep. 112; see also Rose's U. S. Notes).) But, as to certain local matters, regulation of which will work no material prejudice to the general maritime law, or interfere with the proper harmony or uniformity of that law in its international or interstate relations, the rules of the maritime law may be modified or supplemented by state regulation."

The Supreme Court of the United States affirmed the judgment of the Supreme Court of California (276 U. S. 467, 72 L. Ed. 656) and said, with respect to Peterson's employment:

"When injured, certainly he was not engaged in any work so directly connected with navigation and commerce that to permit the rights of the parties to be controlled by the local law would interfere with the essential uniformity of the general maritime law. *The work was really local in character.*" (Emphasis ours.)

The leading case on the subject, of course, is *Southern Pacific Company v. Jensen*, 244 U. S. 205, 61 L. Ed. 1086, 37 Sup. Ct. 524, decided in 1916, wherein it was held that the jurisdiction of the federal courts in civil cases of admiralty and maritime jurisdiction is not exclusive, and states may enact legislation affecting the rights of persons employed pursuant to maritime contracts as long as the state legislation does not contravene the essential purpose expressed by an act of Congress or work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations. The decision of the Supreme Court in the *Alaska Packers'* case, *supra*, was written in 1928, many years after the decision in the *Jensen* case, *supra*. For other cases sustaining the jurisdiction of the Industrial Accident Commission of the State of California, see:

Grant Smith-Porter Co. v. Rhode, 257 U. S. 469, 66 L. Ed. 321, 42 S. Ct. 157;

State Industrial Commission v. Nordenholt Corp., 259 U. S. 263, 66 L. Ed. 933;

Millers' Indemn. Underwriters v. Braud, 270 U. S. 59, 70 L. Ed. 470, 46 S. Ct. 194;

Smith & Son v. Taylor, 276 U. S. 179, 72 L. Ed. 520, 48 S. Ct. 228;

Sultan Railway Co. v. Dept. of Labor and Industries of the State of Washington, 277 U. S. 135, 72 L. Ed. 820, 48 S. Ct. 505.

It is respectfully submitted that the work which the libellant was doing was purely local in character, and was work which could have been done by anyone whether employed as a seaman or not and under the circumstances the

jurisdiction of the Industrial Accident Commission was exclusive since no showing could be made that such application would work any material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law. So far as appellants can ascertain, the Supreme Court of the United States *has never seen fit to overrule its decision in the Alaska Packers' case, supra*. Furthermore, under the recent case of *Davis v. The Department of Labor*, 317 U. S. 249, 87 L. Ed. 175, the Court indicates that full weight should be given to a presumption of the constitutionality of the workmen's compensation laws of a state, and particularly is this true where the facts, as here, bring the case within the rule laid down by the *Alaska Packers' Association case, supra*, and within the exceptions expressed by the Supreme Court in the *Jensen* decision, *supra*.

III.

A Fisherman Injured Prior to the Commencement of the Tuna Season Is Not Entitled to Recover Wages Beyond the Particular Season in Which He Was Injured.

Without conceding that the District Court had jurisdiction in this case, appellants assert that the Court erred in finding that the libellant was entitled to recover wages for both the tuna and sardine fishing seasons.

It has long been the rule that a seaman injured in the service of the ship may recover from the owners of the vessel maintenance and cure and *wages to the end of the voyage*. (*The Osceola*, 189 U. S. 158, 23 Sup. Ct. 43, 47 L. Ed. 760; *The Bouker No. 2*, 241 F. 831.) Although the right to maintenance and a reasonable cure might extend beyond the particular voyage involved, the general

rule seems to be that the right to wages terminates with the end of the voyage. See *Marquina v. S. S. Ipswich*, 1931 A. M. C. 225 *Peninsular and Occidental S. S. Co. v. N. L. R. B.*, 98 F. (2d) 411; *Pell v. American West African Line Inc.*, 1939 A. M. C. 346; *Long v. Seatrain*, 127 F. (2d) 878.

In connection with a seaman fishing on a share basis, the voyage can only be held to be co-extensive with the particular season in which the seaman was engaged at the time he sustained his injury. Obviously the libellant could not have been performing any service or any contract with reference to the sardine season for the reason that pursuant to the laws of the State of California it would have been unlawful to fish sardines prior to August 1st, 1942. (*California Fish and Game Code*, Sec. 1065.)

In its inception the right to recover wages to the end of the voyage must have been based upon the proposition that since the seaman had been incapacitated while on board the vessel it would be unfair to him to put him off the vessel at the end of the voyage without giving him his wages where he had been prevented from fulfilling his duties as a seaman by reason of his incapacity and where he had actually been on the vessel throughout the entire voyage.

If the Court holds, however, that a fisherman, fishing on a share basis and employed for a definite period of time as, for example, ten seasons, is entitled to his maintenance and cure for the period of his injuries and in addition is entitled to recover wages for the period of *his employment*, the Court will have departed from the broad equitable rules which have always governed the courts of admiralty. Since libellant introduced no evidence with reference to the amount of the share earned during the tuna season

and the amount earned during the sardine season, it is submitted that the libellant failed in his proof on the issue of the amount of wages to which he may have been entitled and that this Court should either reverse the decree or order the taking of testimony upon this issue so that the libellant would be awarded only that proportion of the catch which was referable to his 1/17th share of the proceeds of the tuna season.

It is respectfully submitted that the Court had no jurisdiction of the cause. In any event, it is submitted that the libellant is entitled to recover only his share of the catch for the particular season in which he sustained his injury.

Dated Los Angeles, California, June 30, 1944.

HENRY E. KAPPLER,

Proctor for Appellants.

APPENDIX.

Assignment of Errors.

Now come the respondents and claimants, and each thereof, and hereby assign the following errors in the above entitled proceedings:

I.

The District Court erred in finding that the subject matter of the first cause of action set forth in the third amended libel was within the Admiralty jurisdiction of the United States District Court, for the reason that the exclusive remedy of the libellant was and is within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission.

II.

The District Court erred in finding that the subject matter of the second cause of action set forth in the third amended libel was within the Admiralty jurisdiction of the United States District Court, for the reason that the exclusive remedy of the libellant was and is within the exclusive jurisdiction of the Industrial Accident Commission of the State of California or the United States Employees' Compensation Commission.

III.

The District Court erred in finding that the libellant was disabled from May 4th, 1942, to and including April 5th 1943.

IV.

The District Court erred in concluding that the libellant was entitled to the sum of \$94.90, or any other sum in excess of the sum of \$33.00, as or for medical care or attention or medicines.

V.

The District Court erred in finding that the reasonable expenses incurred by the libellant for his support from May 11, 1942, to April 5, 1943, amounted to the sum of \$2.50 per day, or any other sum per day in excess of the sum of \$1.25.

VI.

The District Court erred in concluding that the libellant was entitled to recover the sum of \$825.00 as and for maintenance.

VII.

The District Court erred in finding that the libellant was entitled to recover the sum of \$5,050.46, for a 1/17th lay or share of the catch for both the Tuna and Sardine fishing seasons, when the evidence was undisputed that the libellant sustained his injuries prior to the commencement of the Tuna season.

VIII.

The District Court erred in finding that the libellant was entitled to a 1/17th lay or share of the fish caught and sold during the Sardine season.

IX.

The District Court erred in refusing to find that the award made in favor of the libellant in the proceedings commenced before the Industrial Accident Commission of the State of California, was a bar to libellant's first and second causes of action in the third amended libel in the United States District Court.

X.

The District Court erred in finding that the libellant was entitled to any maintenance whatever for any period of time whatever.

XI.

The District Court erred in finding that the libellant was injured while in the service of the ship.

XII.

The District Court erred in finding that the libellant is a seaman within the designation of persons permitted to sue without furnishing bond for or prepayment of or making deposit to secure fees and costs for the purpose of entering in and prosecuting suits conformable to the provisions of Title 28, Section 837, U. S. C. A.

XIII.

The District Court erred in finding that all and singular the premises are true and within the Admiralty and Maritime jurisdiction of said Court.

XIV.

The District Court erred in finding that the Diesel Screw "Betsy Ross" engaged in fishing from on or about the 4th day of May, 1942, to on or about the 15th day of February, 1943.

XV.

The District Court erred in finding that on or about the 3rd day of May, 1942, the Diesel Screw "Betsy Ross" was destined for a nine months Tuna and Sardine fishing seasons.

XVI.

The District Court erred in finding that the libellant was entitled to any sum whatsoever upon either the first or second causes of action set forth in the third amended libel.

XVII.

The District Court erred in finding that the libellant was entitled to a decree against the respondents and claimants,

or any of them, in the sum of \$5,050.46, or any other sum whatsoever or at all, upon the second cause of action set forth in the third amended libel.

XVIII.

The District Court erred in finding that the libellant was entitled to recover the sum of \$919.90, or any other sum whatsoever or at all, upon the first cause of action set forth in the third amended libel.

XIX.

The District Court erred in not concluding that the libellant was not entitled to recover any sum whatsoever or at all from the respondents and claimants, or any of them, and in not concluding that the third amended libel should be dismissed with costs in favor of the respondents and claimants [Ap. 48-51].